



August 2, 2010

VIA Federal eRulemaking Portal

Ms. Jessica Finkel
U.S. Department of Education
1990 K Street, N.W., Room 8031
Washington, D.C. 20006-8502

Re: *Program Integrity Issues, Notice of Proposed Rulemaking,
U.S. Department of Education Docket ED-2010-OPE-0004*

Dear Ms. Finkel,

Kaplan Higher Education ("Kaplan") was pleased to be an invited negotiator at the process that led to the Notice of Proposed Rulemaking on Program Integrity Issues ("NPRM") in postsecondary education. Kaplan applauds the commitment of the Department of Education ("Department") to program integrity and to regulations that ensure that all students are fully informed about the content and costs of the educational programs in which they enroll. Accordingly, we enthusiastically endorse the Department's efforts to ensure that students are fully informed about the content and costs of the programs in which they enroll and that they receive the high-quality education they need to succeed in the 21st century global economy. As a result, Kaplan in its attached Comments supports many provisions of the Department's proposed regulations.

However, Kaplan's Comments focus on several critical areas where the proposed rules will have unintended, real world consequences that hinder or impede a school's ability to provide students these high-quality educational programs, that in turn, allow students to obtain jobs and commence careers that may transform their lives.

The President of the United States and the Department have recognized that post-secondary education must be broadly available if the United States is to achieve its social and economic goals. Indeed, the President has stated that he wants the United States to have the highest percentage of college graduates in the world by the year 2020. See "*Duncan Says For-Profit Colleges Are Important to Obama's 2020 Goal*," by Andrea Fuller, *The Chronicle of Higher Education* (May 11, 2010). That is why the United States will make significant investments in the

students who will receive that education under Title IV of the Higher Education Act of 1965, as amended by the Higher Education Act Amendments of 1992 ("HEA").

The President and the Department also have acknowledged the critical role served by proprietary colleges in meeting our country's goals. See 5/11/10 *Chronicle* article, above. Today, proprietary colleges educate 2.7 million students annually, including numerous non-traditional students. The United States cannot achieve its educational, social and economic goals without the full participation of the proprietary education sector. Kaplan, in its turn, is deeply committed to ensuring that its students receive high-quality education so that they can perform 21st century jobs, without the burden of excessive debt.

Kaplan wishes to underline the important role that proprietary educational institutions serve in providing non-traditional and low-income students with access to post-secondary education and training. Proprietary colleges help these students graduate and obtain gainful employment at higher rates than do public schools. See *Parthenon Perspectives on Private Sector Post-Secondary Schools: Do They Deliver Value to Students and Society*, by Robert Lytle, Roger Brinner, and Chris Ross, page 8 (Feb. 24, 2010), citing National Center for Education Statistics (NCES) Beginning Postsecondary Students (BPS) data (Feb. 4, 2006). Proprietary schools also offer non-traditional students who have family and job responsibilities the flexibility they need to pursue post-secondary education.

During the Negotiated Rulemaking process, the negotiators, including Kaplan, reached agreement on nine of the proposed rules that are the subject of the 14-rule NPRM. Unfortunately, the parties were unable to settle on a complete set of rules whose provisions as a whole would acceptably balance all relevant interests. Kaplan endorses and supports the adoption of the proposed rules that will ensure the quality of the educational programs being offered, including the six rules addressing (1) retaking coursework, (2) satisfactory academic progress, (3) return of Title IV funds, taking attendance, (4) verification and updating of student aid applications, (5) ability-to-benefit testing, and (6) disbursement of funds.

In addition, Kaplan endorses and supports adoption of substantial portions of the other proposed rules, several of which were the subject of agreement during the Negotiated Rulemaking. For the reasons set forth in our Comments below, however, Kaplan seeks clarifications or other changes to portions of the proposed rules (presented in the order in which they appear in the NPRM) addressing:

1. Gainful Employment Reporting
2. Credit Hours
3. State Authorization
4. Written Agreements Between Institutions
5. Incentive Compensation
6. High School Diplomas
7. Return to Title IV funds, term-based programs with modules
8. Misrepresentation

Kaplan is convinced that portions of these rules, as currently drafted, will detract from and impede the important goals that the President has articulated and that Congress sought to further in the HEA. In our separate comment sections on each of these eight rules below, we explain our concerns and requests for clarification or other change.

Again, Kaplan strongly supports many of the proposed rules and, indeed, many portions of the proposed rules about which it has commented. We respectfully request, however, that the Department give serious consideration to the practical negative effect that many components of the proposed rules will have on schools' ability to provide educational programs to students with the resulting benefits to their families and, ultimately, to our nation's economy and prosperity.

Yours Truly,



Janice L. Block
Executive Vice President, General Counsel
& Chief Compliance Officer

NOTICE OF PROPOSED RULEMAKING:
DOCKET ID ED-2010-OPE-0004

PROGRAM INTEGRITY ISSUES: COMMENTS
OF KAPLAN HIGHER EDUCATION

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GAINFUL EMPLOYMENT REPORTING: **COMMENTS OF KAPLAN HIGHER EDUCATION**

The HEA provides that eligible higher educational institutions which offer certain kinds of programs must “prepare students for gainful employment in a recognized occupation.” 20 U.S.C. Sections 1001(b)(1) and 1002(a). The draft rules on gainful employment propose to (1) establish a new definition of “recognized occupation,” (2) require eligible institutions to report certain information to the Department about each student who completes a program offered by that institution; and (3) require eligible institutions to disclose on their websites specified information about each program offered.

Since the Department released its proposed rules on Gainful Employment in two separate NPRMs, this Comment focuses solely on the Department’s proposals contained in its June 18, 2010 NPRM. Kaplan will file a separate Comment on the Department’s July 26, 2010 NPRM relating to the application of the Gainful Employment definition to program eligibility.

Kaplan agrees with the Department’s proposal that the phrase “recognized occupation” (i) be identified by a Standard Occupational Classification (SOC) code or an Occupational Information Network O* NET-SOC code, or (ii) be the subject of a determination by the Secretary of Education. In addition, while we generally support reporting and disclosure requirements, ***Kaplan asks the Department to make substantial refinements to the requirements so that the disclosures will be clear and relevant to students and workable for affected institutions.*** These refinements also will better allow the Department to meet the goals outlined in its recent July 26, 2010 NPRM detailing additional program requirements related to the definition of gainful employment.

1. Needed Refinements to Proposed Rule § 668.6(a)

Proposed Rule § 668.6(a) requires each institution to report: (1) information needed to identify the student, (2) the Classification of Instructional Program (CIP) code of the program that the student completed, (3) the date the student completed the program, and (4) the amounts the student received from private educational loans and institutional financing plans. Federal Register, volume 75, page 34,873. We do not object to reporting requirements (1)-(3), or to the requirement in (4) that an institution report on the amounts that its students receive from its institutional financing plans. ***We do, however, ask that the Department reconsider its proposal that institutions report for each student the amounts that student received from private educational loans.***

Most institutions do not collect information about the amounts students receive from private educational loans unless those loans are provided by the institution itself. Collecting this information from each student would impose a substantial burden on colleges. In addition, the institutions themselves are only an indirect source of this information which is within the personal knowledge of students and their families. Accordingly, if the Department has concluded that it should collect this information, it should require students to report the

amounts of current and anticipated private educational loans each time they submit a Free Application for Federal Student Aid ("FAFSA"), or some other form.

Further, we suggest that the scope of the disclosure requirements with regard to private educational loans, institutional financing plans, and median loan debt encompassed in proposed rules §§ 668.6(a)(4) and 668.6(b)(5) be better defined so as to exclude the following:

- a. ***Debt incurred for living expenses:*** The proposed disclosures of program-related student borrowing should not count debt incurred to pay for living expenses, particularly since such added borrowings are at the discretion of students, not institutions;
- b. ***Debt incurred for prior education at unrelated institutions:*** Similarly, to avoid the disclosure of overstated and exaggerated median loan debt data – and as a more accurate means of presenting data that on the level of borrowing attributable to each educational program – prior education debt should be excluded. We note that such debt is not included in the calculation of overall debt which the Department proposes in its July 26, 2010 gainful employment NPRM unless it is debt incurred at institutions under common ownership; and
- c. ***Debt paid while in school:*** Debt incurred under an institutional payment plan that is to be paid off while the student is still in school does not fall within the scope and purpose of the planned disclosure and should be excluded.

2. Needed Refinements to Proposed Rule § 668.6(b)

Proposed Rule § 668.6(b) requires each institution to disclose on its website for each program it offers: (1) the occupations (by names and SOC codes) that the program prepares students to enter (with links to the occupational profiles on the O*NET or its successor), (2) the on-time graduation rate for students entering the program, (3) the cost of the program, (4) the placement rate for students completing the program, and (5) the median loan debt incurred by students who completed the program during the preceding three years, separately breaking out median loan debt from Title IV loans, HEA program loans, and private educational loans and institutional funding plans. Federal Register, volume 75, page 34,873. ***Kaplan respectfully proposes several necessary modifications to clarify subsections (1), (2) and (4), and has an important comment on subsection (5), as follows:***

- ***Occupations.*** With regard to Proposed Rule § 668.6(b)(1) on the reporting of occupations that the program prepares students to enter, we suggest that this reporting clarify that where a program may lead to gainful employment in a substantial number of related occupations, institutions may exercise the discretion to list only those occupations in which a majority of enrolled students have been placed and to omit the others. This will reduce confusion about the career focus of

the program and prevent students from being misled by job classifications that may apply to only a small number of graduates.

- ***On-Time Graduation Rates.*** With regard to Proposed Rule § 668.6(b)(2) on the reporting of on-time graduation rates for students entering the program, the NPRM does not specify how such rates are to be calculated. The rules should provide such guidance and should rely upon methodologies similar to those of the larger national accrediting agencies. The Department's IPEDS formulation is unworkable for this purpose, as it only applies to a narrow sub-cohort of students and fails to take into account standard benchmarks long utilized in the accreditation community to which institutions and consumers are accustomed.
- ***Placement Rates.*** With regard to Proposed Rule § 668.6(b)(4) on the reporting of placement rates, Kaplan objects to the NPRM's utilization of placement rates as determined under § 668.8(g). Section 668.8(g) contains the placement formula for determining the eligibility of short programs that are less than two-thirds of an academic year in length (only 600 clock hours). This highly restrictive measure was devised for use solely in connection with extremely short programs offered by a tiny percentage of Title IV-participating institutions. It is not workable for longer-term programs. Furthermore, institutions are already required to disclose any rates they calculate. Schools calculating rates pursuant to accreditor or state requirements should not also be required to calculate and disclose an additional rate not originally intended to be applicable to most programs. The additional rate will only serve to confuse current and potential students. For schools not required to calculate placement rates, the rules should rely not on the rate calculation in § 668.8(g), but instead upon methodologies based on those of the larger national accrediting agencies or the State in which the institution is licensed to operate, but with additional flexibility, particularly for degree programs, as degree-seeking students are likely to use their degree for general employment advancement.
- ***Median Loan Debt.*** With respect to subsection (5), the Department proposes that it "provide the institution with the median Title IV, HEA loan debt, by program, and the median debt from private loans and institutional financing plans by program," and that the "institution would then disclose these amounts." Federal Register, volume 75, page 34,809. The Department's willingness to provide eligible institutions with this information is critically important because it significantly lessens the burdens associated with complete and accurate disclosure.

As the Department is aware, Kaplan has strongly supported a requirement that institutions disclose the information students need to make informed decisions prior to taking on debt. See, e.g., Letter from Andy Rosen, Chairman and CEO of Kaplan, to The Honorable Cass R. Sunstein, Office of Information and Regulatory Affairs, Office of Management and Budget, page 7 (May 21, 2010). We believe that a disclosure requirement can immediately address the Department's concerns about student over-borrowing *and* provide the Department with the experience and data it needs to determine whether any additional

regulations concerning gainful employment are necessary or appropriate. We also agree that website disclosure is the most efficient way to provide the relevant information to prospective students.

Accordingly, Kaplan supports the proposed gainful employment disclosure requirements with the above-requested refinements. In addition, we urge the Department to collect data and analyze whether the disclosure requirement itself – either as proposed or with supplemental disclosures – can solve the problem of students taking on disproportionate debt for the value of the program they are pursuing. ***We strongly recommend that the Department not move forward with the significant and unprecedented regulatory proposals contained in its July 26, 2010 NPRM until it has sufficient experience and data to determine whether disclosure in combination with other changes, such as those to the misrepresentation rules (see below), largely address the problem of student over-borrowing.***

CREDIT HOUR:
COMMENTS OF KAPLAN HIGHER EDUCATION

By its proposed new definition of a credit hour, the NPRM takes the unprecedented, unnecessary, and apparently unlawful step of federalizing a fundamental academic measure that has historically been administered by recognized accrediting agencies and State authorizing agencies. For decades, the vast majority of colleges and universities in the United States have relied upon credit hours to measure academic progress in their courses of instruction and curricula. Credit hours are a bedrock component by which colleges and universities administer postsecondary curricula and programs. The proposed rules concerning credit hours would result in the exercise of direct federal supervision and control over educational programs and curricula by imposing quantitative instructional-activity standards on every credit-hour course, program, curriculum and credential.

The Department is now dictating that time spent in class, rather than learning outcomes, is the main metric by which program substance will be judged. The use of technology to move learning out of the traditional classroom, assess ongoing learning, and to maintain the flexibility to accelerate or decelerate instruction as needed, will be minimized in favor of treating all students the same from the federal level regardless of ability, as long as they are in class the specified number of hours. Instead of codifying this outdated measure of student learning, the Department should be embracing and nurturing more tailored forms of instruction. Unfortunately, defining credit hour as the Department proposes will stifle such innovative learning applications. The result of this action will be to codify an antiquated "time in seat" concept of learning assessment just when technology is rendering it obsolete. The Department's proposal will lock schools into an 18th century concept that will stifle innovation just as the rest of the world is adopting such technology-based educational improvements.

Furthermore, this proposed rule is an extraordinary intrusion into an area of traditional State and accreditor control that is contrary to Congress's clearly expressed desire in the General Education Provisions Act to keep federal regulators from exercising undue control of States and local educational institutions. The General Education Provisions Act provides:

Sec. 1232a. Prohibition against Federal control of education

No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

20 U.S.C. Section 1232a (emphasis added). See also *Wheeler v. Barrera*, 417 U.S. 402, 416 (1974) (Congress's "concern was directed primarily at the possibility of [federal agencies]

assuming the role of a national school board”), *modified on another ground*, 422 U.S. 1004 (1975).

The Department notes that the new definition would “establish a basis for measuring eligibility for federal funding.” Federal Register, volume 75, page 34,811. That observation does not change the fact that the proposed rules run afoul of the prohibition against federal control of institutional curricula and programs. The rules’ regulatory purposes relating to Title IV do not lessen their effect, which is to impose federal control over almost all educational programs offered by colleges and universities in this country.

The proposed rules’ dramatic departure from past policy and practice is also unnecessary because, simply by revising the existing accrediting agency recognition rules, the Department could tighten federal regulatory control over credit-hour allocations without exerting federal control over the academic prerogatives and curricula of educational institutions. Indeed, the Department’s proffered justification for a federal definition of credit hour is that “[t]here is no definition of a credit hour in any current regulations for programs funded under the HEA,” and that “the term is not defined in the regulations that set out the requirements for the Secretary’s recognition of accrediting agencies.” Federal Register, volume 75, page 34,810. Thus, the Department itself appears to recognize that if more guidance is needed on credit hours, an obvious way to provide it would be to add further specificity to the recognition standards. ***We urge the Department to replace the proposed federal credit-hour definition with a less restrictive, less intrusive set of additional proposed revisions to the accrediting agency recognition criteria.***

Beyond our threshold objections to the federalization of credit hours, ***Kaplan respectfully asks that the Department modify at least four aspects of the credit-hour definition and the proposed rules concerning the formula for conversion of clock hours to credit hours.***

First, we suggest that the opening phrase of subparagraph (1) of the proposed credit hour definition be revised as follows (added language is italicized):

“(1) One *clock* hour of classroom or direct faculty instruction and a minimum of two *clock* hours of out of class student work each week”

For many years, the regulations have contained an established definition of a clock hour used for clock-to-credit hour conversion purposes. That clock-hour definition provides useful guidance on the parameters of what quantity of time suffices in determining credit-hour equivalency. The NPRM, as currently drafted, provides no guidance about what will constitute an “hour” for these purposes. ***We therefore suggest that, assuming a credit-hour definition is promulgated, it should utilize the clock-hour measure consistent with the companion provision on clock-to-credit hour conversion formulas.***

Second, the proposed rules should be changed to clarify that institutions are entitled to rely on credit-hour approvals obtained from institutional accrediting agencies when such approvals are based upon a review performed in accordance with the accreditor’s governing rules. Where an institution’s accrediting agency approves its credit-hour allocations, and the

institution then structures and provides programs consistent with such approval, the institution should be entitled to rely on that accrediting agency approval and should not be subject to any audit, program review, or other federal compliance finding that would seek to retroactively reverse, contradict, or overturn the prior accrediting agency approval.

Accordingly, the proposed rules should be modified to specify that the credit hours awarded for a program shall be deemed in compliance with the definition of a credit hour in 34 C.F.R. § 600.2, where the credit hours awarded have been approved by the institution's accrediting agency based upon a review performed in accordance with § 602.24(f). As a parallel change, we suggest that the proposed provisions at Proposed Rule § 668.8(k)(2)(ii) be stricken from the final rule.

Third, there needs to be a modification to the provisions that apply the new federal clock-to-credit formula in proposed rule § 668.8(l) to programs that are required by state or federal agencies to be measured in clock hours. Proposed Rule § 668.8(k)(2)(i)(A) would apply the new formula "if ... a program is required to measure student progress in clock hours when . . . [r]eceiving Federal or State approval or licensure to offer the program." Federal Register, volume 75, page 34,814. The proposed language is unclear and overbroad. For example, the proposed language does not distinguish between informational requests on a licensure application and state requirements that a program be measured only in clock hours. Whereas the latter may be a reasonable trigger for application of the federal conversion formula, the former is not. ***Therefore, we suggest that the Department modify the language to state that the new formula applies "if a program is required by a state or federal agency to be measured in clock hours and that agency does not permit the program to be measured in credit hours."***

Fourth, Kaplan asks that the Department clarify in the final rules that the credit-hour definition and the accompanying clock-to-credit hour conversion formula do not impose federal attendance standards and requirements on institutions. ***Kaplan respectfully requests that the Department make clear that those proposed rules, if made final, would not require proof that students individually attended and/or performed a specific quantity of classroom, direct faculty instruction, out-of-class work, or other educational activities.*** The proposed rules are intended to provide a framework for educational program structure, not a yardstick to measure whether particular students were in attendance or spent a particular amount of time on their classroom studies or out-of-class preparation. This intent should be made clear if the federal credit-hour definition is made final.

STATE AUTHORIZATION:
COMMENTS OF KAPLAN HIGHER EDUCATION

To be eligible to participate in the federal Title IV program, institutions must be “legally authorized” within a State to provide a program of education beyond secondary education. 20 U.S.C. Sections 1001(a)(2) and 1002(a). The current regulations do not define or otherwise elaborate on the requirement of a State’s “legal authorization.” According to the Department, state authorization has been treated as a “minimal” requirement in the past. Federal Register, volume 75, page 34,813. The Department has now determined that state authorization should be treated as a “substantial requirement where the State is expected to take an active role” – both in approving institutions and in monitoring and “responding appropriately” to complaints and alleged misconduct. *Id.*

Under the proposed rules, an institution will only be considered “legally authorized” by a State if (1) the authorization specifically relates to the institution’s offering of programs beyond secondary education (*i.e.*, is not merely an authorization to do business in the State), (2) the authorization is subject to adverse action by the State, and (3) the State has in place a process to review and act on complaints about the institution and to enforce applicable state laws against the institution. See Federal Register, volume 75, at 34,813.

While Kaplan does not object to appropriate State regulation, it has three serious concerns about the Department’s attempt to force States to regulate institutions where it may not have done so in the past.

First, the proposed regulation exceeds the Department’s power to direct the States and infringes upon the States’ sovereignty. The HEA does not authorize the Department to “use the States as implements of regulation,” *New York v. United States*, 505 U.S. 144, 161 (1992), or to dictate the manner in which States legally authorize institutions to offer post-secondary programs within their borders. The HEA provides only that an eligible educational institution must be legally authorized within a State, leaving to the State the determination of how to provide (or deny) such an authorization. The Department, however, has interpreted this statutory phrase to provide it with broad authority to define state authorization and dictate its terms. By doing so, the Department seeks to impose upon the States a significant part of the burden of policing the eligibility of institutions to obtain federal Title IV funds.

The proposed rules infringe upon the States’ sovereignty by commanding “state governments to implement legislation enacted by Congress.” *New York v. United States*, 505 U.S. at 176. Specifically, under the proposed rules, the States must adopt legislation or rules that expressly authorize institutions to offer post-secondary programs and that subject such an authorization to adverse action by the State. In addition, the proposed rules require that States establish a process to act on complaints about the institution and enforce state laws against the institution. The Department thus “purports to direct [state officials] to participate . . . in the administration of a federally enacted regulatory scheme” in violation of state sovereignty. *Printz v. United States*, 521 U.S. 898, 904 (1997). By doing so, the federal government is “forcing state governments to absorb the financial burden of implementing a federal regulatory program,” while allowing the federal government to “take credit for

'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." *Printz v. United States*, 521 U.S. at 930.

The Department cannot construe the HEA so as to require a State to regulate according to the Department's wishes. Such a construction exceeds the Department's authority under the HEA and violates the States' rights under the Tenth Amendment.

Second, as a practical matter, under the proposed rules, students at institutions that are Title IV eligible may lose their eligibility through no fault of their own, simply because the State either can no longer afford or no longer chooses to conduct the required authorizing, monitoring and enforcement activities. Neither Kaplan nor any other eligible institution can require a State to undertake the mandatory activities set forth in the proposed rules. If the States choose not to, students will be the primary victims if they are unable to continue the education that they have paid for (or borrowed money to fund).

The Department cites events in California as support for requiring States to establish agencies or other entities to authorize and take action against institutions that offer post-secondary programs. Federal Register, volume 75, page 34,813. In fact, those events illustrate the problems with the proposed rules' approach. California's Bureau for Private Postsecondary and Vocational Education, the agency which had acted as the regulatory agency for private proprietary postsecondary education in the State, was eliminated when its authorizing law expired and was not immediately replaced. *Id.* Under the current regulatory system, this idiosyncratic State action did not disrupt the educational programs or students within its bounds. Indeed, the Department offers no data or even anecdotal evidence that any person was harmed as a result of the State agency's temporary dissolution or that any educational program somehow took advantage of the regulatory gap to lower its standards or harm students. Ironically, however, had the proposed rules been in effect, institutions in California would have lost their eligibility with disastrous consequences for the students, their families, the schools and their employees.

The Department hypothesizes that "had [the draft rules] been in effect at that time, [that] would have required that the State keep in place the prior oversight agency, or . . . designate a different State agency to perform the required State functions during the transition." Federal Register, volume 75, page 34,813. But the Department cites nothing to support its conjecture. California's political and budget challenges have often placed the State in intractable situations; it is equally plausible that the State would have simply allowed the Title IV eligibility of institutions to lapse. ***The proposed regulations leave students and institutions at the mercy of State government and finances. The Department should not do so.***

At the very least, the Department must provide sufficient lead time to come into compliance for those States that lack authorization procedures that satisfy the proposed rules' requirements. The first step that the Department must take is to determine how many States currently have processes in place that would meet the standards laid out in the proposed rules and how many States do not. The Department will then have a clear sense of the scope of the challenge that educational institutions face in seeking State authorization for

their educational programs. The Department must then ensure that those States lacking adequate processes have a reasonable period of time beyond July 1, 2011, to enact legislation or regulations that would satisfy the requirements of the proposed rules. If the Department fails to do so, students and institutions in States without compliant laws will face substantial and costly disruption, through no fault of their own. ***It would be wholly unreasonable for the Department to subject educational institutions to a system that requires States to enact prescribed laws without first ascertaining the scope of the current deficiency in States' laws and then determining a realistic time period to allow all such States to consider and adopt legislation or regulations.***

Third, the Department should provide institutions with alternative pathways to legal authorization when States, for whatever reasons, decline to play the part the Department has proscribed for them. For example, as the Department noted (Federal Register, volume 75, page 34,813), many States exempt from individual authorization and other state-law requirements educational institutions offering regionally accredited post-secondary programs. The California Private Postsecondary Education Act of 2009 exempts from its provisions an institution that is accredited by a regional accrediting agency recognized by the Department. See California Education Code § 94874.1. See also Iowa Code § 261B. Such laws provide an appropriate pathway to legal authorization for States without the resources to build another bureaucracy or with a desire to avoid any duplication of effort. The Department is critical of the States for “deferring . . . their oversight responsibilities to accrediting agencies for approval of educational institutions.” Federal Register, volume 75, page 34,813. However, the States do so in order to avoid burdensome, duplicative regulation and to conserve resources in a time of tightening budgets. The Department should not assume that the States can shoulder a new responsibility, and students and educational institutions should not have to bear the risk that States will be unable or unwilling to do so.

Accordingly, Kaplan urges the Department to alter the proposed rules to provide that in States where institutions are specifically exempt or granted waivers from overall licensing requirements by a state agency (e.g., Iowa and California), that exemption or waiver fulfills the Department's requirement that an educational institution possess a “charter, license, approval, or other document” of authorization from the State.

WRITTEN AGREEMENTS BETWEEN INSTITUTIONS: COMMENTS OF KAPLAN HIGHER EDUCATION

The proposed regulations impose specific limits on written agreements between educational institutions, including those with common ownership. They also require institutions to provide information about written agreements to students, including the portion of the program the home institution is not providing, the estimated additional costs that would be incurred due to the agreement, the method of delivery of the portion of the program that is outside the home institution, and the names and locations of the other institutions.

Kaplan generally supports the Department's proposed rules regulating written agreements between educational institutions and, in particular, supports the proposed rules' requirement that institutions disclose, to current and prospective students, information about their written agreements with other institutions. ***Kaplan, however, seeks clarification in two areas.***

First, the proposed rules may limit the ability of an enrolling or home institution to enter into an agreement with a commonly-owned institution to provide online courses or distance learning unless the enrolling or home institution is also authorized by an accrediting agency to provide online courses or distance learning. Proposed Rule § 668.5(a) & (b) authorizes written arrangements between eligible institutions "if the educational program offered by the institution that grants the degree or certificate otherwise satisfies the requirements of 668.8." Federal Register, volume 75, page 34,873. In turn, Rule § 668.8(m) provides that an institution's "otherwise eligible program" is not eligible if offered "in part" by telecommunications or distance learning unless the institution has been evaluated and accredited "for its effective delivery of distance educational programs by an accrediting agency" recognized by the Department with "accreditation of distance learning" within its scope. 34 C.F.R. § 668.8(m).

Explanatory statements in the NPRM observe that the proposed rules are "intended to ensure that the institution enrolling the student has all necessary approvals to offer an educational program in the format in which it is being provided, such as through distance education, when the other institution is providing instruction under a written agreement using that method of delivery." Federal Register, volume 75, page 34,814. Thus, under the proposed rules, it appears that if Institutions A and B enter into an agreement under which Institution A grants the degrees and Institution B provides some of the courses online, the program may not be eligible for Title IV funding unless Institution A has appropriate distance-learning approvals from its accrediting body.

This limitation is of particular concern to Kaplan because it may limit the ability of campus-based schools to offer cutting-edge online delivery methods for some programs, even when these online courses are provided by affiliated and fully accredited institutions. The proposed rules should not limit this type of cross-mode class offering by commonly-owned educational institutions. This kind of written agreement between related educational institutions gives students substantial flexibility in designing their post-secondary educational program and allows schools to effectively leverage technologies used at other institutions.

Students, particularly non-traditional students, highly value options in their educational programs, including options about the timing of a class offering, the content of a class, the method of delivery of instruction, or the location at which instruction may be obtained. One important reason that educational institutions enter into agreements with other institutions is to provide their students with options that differ from the home or enrolling institution's approved offerings.

Accordingly, it makes little sense to require that the home or enrolling institution have the same approvals as are held by the providing institution. Imposing the requirement that enrolling and providing institutions have the same approvals would limit students' flexibility and access to the programs that they choose. Having this requirement will also stifle innovation in the delivery of education. Moreover, the Department has failed to point to any data that supports its belief that this limitation is necessary or that this type of arrangement between enrolling and providing institutions has caused problems for students. The Department should not impose an additional regulatory burden on educational institutions without evidence of the existence of a problem that must be addressed.

Kaplan respectfully asks that the Department either remove the provision requiring the enrolling institution to have the same approvals as the providing institution or clarify that the proposed rules do not carry this meaning.

Second, the proposed rules addressing commonly-owned institutions appear to apply only to proprietary schools. See Federal Register, volume 75, page 34,815 ("it is not the Department's intention for either public or private, non-profit institutions to be covered by the proposed language because these institutions are not owned or controlled by other entities, and generally act autonomously"). If this reading of the proposed rules is correct, the Department has unreasonably singled out proprietary institutions. The Department's goal is to protect students who enroll in a particular institution from a bait-and-switch which might require those students to participate in another institution's educational program at greater cost, at significant inconvenience (due to distance), or with inferior classes, teachers or delivery methods. If agreements between institutions have caused problems (though the proposed rules do not cite evidence in support of this proposition), students who attend public and non-profit institutions, like students who attend for-profit schools, will experience those problems. ***If the proposed rules are adopted, they should apply to agreements between all eligible educational institutions.***

INCENTIVE COMPENSATION:
COMMENTS OF KAPLAN HIGHER EDUCATION

Students cannot take advantage of educational opportunities that help prepare them for higher-paying careers if they do not learn about those opportunities. Every post-secondary institution – whether non-profit, public, or proprietary – must identify and properly compensate institutional representatives who are able to provide accurate and complete information about their institutions to prospective students and to enroll qualified students. These employees are professionals who work every day to locate high-quality students who will benefit from the institution's offerings. In short, as the Department acknowledges in the NPRM, "a recruiter's job description is to recruit." See Federal Register, volume 75, pages 34,806 and 34,818 (June 18, 2010). When a recruiter or admissions advisor does her job well, it benefits students, who are better informed and equipped to make decisions about their education and, therefore, better able to complete and benefit from their educational programs.

Despite this reality, under the proposed incentive compensation regulations, an institution would be forbidden to compensate employees based on how well they do their jobs. This is an astonishing prohibition that contradicts Congress's intent and the Department's long-standing interpretation of the incentive compensation prohibition in section 487(a)(20) of the HEA. The Department also seeks to expand dramatically the group of employees whose compensation arrangements are subject to the prohibition, widen the types of performance measurements that will be disallowed, and outlaw numerous third-party marketing and recruiting contracts that its regulations have also deemed legal for at least the last decade.

Kaplan strongly supports regulations designed to ensure that recruitment activities are ethical and appropriate, and that students are given accurate and complete information about their educational opportunities. Kaplan maintains strict internal policies and procedures designed to ensure those goals, and we are staunch proponents of sound recruitment practices that protect students. But, the proposed regulations arbitrarily abandon the existing regulatory framework – without adequate factual support or explanation – and reinstate a prior system of guesswork that, by the Department's own assessment, wholly failed to provide institutions with sufficient guidance. At the very least, the Department's new reading of the incentive compensation prohibition leaves institutions with massive uncertainty about how they can compensate their employees or third parties. The large holes left by the lack of guidance will reward institutions who are willing to push the limits. In this environment, the scales will be tipped in favor of schools willing to play fast and loose with the rules, even while risking the occasional "lightning strike" of a Department review. In other words, the failure to provide clear guidance will have the unintended consequence of rewarding bad behavior while punishing those like Kaplan who strive to do the right thing.

The Department should not adopt the proposed changes to the current incentive compensation regulations and, specifically, should not eliminate the current interpretive rules (34 Code of Federal Regulations (C.F.R.) § 668.14(b)(22)(ii)), unless it proposes to replace

them with equally specific guidance about the types of compensation arrangements that are lawful. At a minimum, for the reasons detailed below, the Department should not eliminate the concrete guidance which the current regulations provide with regard to:

- a. setting merit-based salaries and making routine salary adjustments based on performance (§ 668.14(b)(22)(ii)(A)),
- b. payments to managers who do not directly supervise admissions advisors or financial aid personnel who make decisions about the awarding of HEA program funds (§ 668.14(b)(22)(ii)(G)),
- c. compensation based upon student retention and graduation (§ 668.14(b)(22)(ii)(E)), and
- d. structuring revenue-sharing arrangements with third parties (§ 668.14(b)(22)(ii)(J),(K)&(L)).

1. The Proposed Rules Remove Meaningful Guidance That Helps Institutions Comply

The history of the incentive compensation prohibition, enacted by Congress in 1992, has shown that it is extraordinarily difficult to know how to fairly compensate admissions and financial aid employees without running afoul of this statutory provision. As a result, this is an area where clear interpretive rules are more important, not less so. We urge the Department not to abandon 18 years of evolved guidance on this matter, but rather to provide institutions with more clarity. The absence of this guidance will do significant harm to the long-standing compliance programs and efforts of institutions such as those owned by Kaplan.

In 1994, the Department promulgated its first set of incentive compensation rules, which did little more than restate the language of the incentive compensation statute (similar to the proposal set forth in the current NPRM). Under the 1994 rules, institutions were wholly at sea about whether their compensation practices were compliant, and the Department found itself compelled to issue a series of private guidance letters. That system of private guidance was inefficient and ineffectual because the guidance rendered was incomplete, and sometimes inconsistent, and because the guidance was not published or otherwise made generally available. One example that has previously been brought to the Department's attention is the uneven advice – provided in at least three separate private guidance letters – about how frequently regulated institutions could adjust compensation for admissions advisors and financial aid personnel. See Letter from Brian Kerrigan, Department of Education, to Charles Galland, Computer-Ed, Inc. (July 8, 1997) (*single* annual adjustment permitted); Letter from Jeffrey Baker, Department of Education, to Alice Kurz, Arthur Andersen (January 23, 1996) (*single* annual adjustment permitted); Letter from Brian Kerrigan, Department of Education, to Stanley Freeman, Powers, Pyles, Sutter & Verville (April 3, 1996) (*two* annual adjustments permitted).

Contrary to the Department's suggestion in the current NPRM, the language of the incentive compensation prohibition in section 487(a)(20) is *not* "clear," and institutions *cannot* "readily determine" whether payments are lawful. Federal Register, volume 75, pages 34,817 and 34,818. Until 2002, when the Department enacted the rules it now proposes to eliminate, the Department received and recognized compelling evidence that the incentive compensation prohibition did not provide institutions with sufficient clarity about which compensation arrangements were lawful and which were not. This was noted in the last NPRM in 2002, *Federal Student Aid Programs*. There, the Department said that the rulemaking's purpose was to "clarify the statutory program participation agreement provision concerning incentive payment restrictions." See Federal Register, volume 67, page 67,049 (November 1, 2002).

Furthermore, in 2002, the Department also recognized that the detailed guidance provided by the current rules did not carve out "exceptions" to the incentive compensation prohibition, but instead simply clarified the compensation arrangements that the Department itself deemed legal under this section:

The list of [authorized] activities is derived from compensation and payment plans that the majority of the negotiators agreed should be included. They provide institutions with specific, concrete examples of payment they can make *that do not violate the statutory provision*.

Institutional Eligibility Under the Higher Education Act, Federal Register, volume 67, pages 51,718 and 51,723 (Aug. 8, 2002) (emphasis supplied).

Nothing has changed that eliminates the need for the clear guidance those rules provide. There is no justification whatsoever for returning to the decade of uncertainty and confusion that preceded the current rules in 2002. As leading authorities recognize, what the Department proposes will result "in a vacuum concerning acceptable and unacceptable practices." See "*Elimination of the Safe Harbors for Incentive Compensation*," by Mark Kantrowitz, page 8 (April 26, 2010).

Under well-established principles of administrative law, the Department's decision to return to a bare-bone regulatory system must be fully explained and justified in light of a virtually identical system's past failure. See *Motor Vehicles Manufacturers Association of U.S., Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983). Absent such an explanation, the Department's decision to revert to a former regulatory system – already proven to be inadequate – would be deemed *arbitrary* and *unreasonable*. See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (finding that an agency must provide a reasoned explanation of a change in course, particularly where the "new policy rests upon factual findings that contradict those which underlay its prior policy"). Yet, the Department has not provided a reasoned explanation for abandoning existing regulations or re-instating the previously failed system. Indeed, a recent General Accountability Office (GAO) Report indicates that there is no such reasoned explanation. This Report reveals that after the adoption of the current rules in 2002, incentive compensation violations actually *decreased* in number. See *Higher Education Information on Incentive Compensation Violations Substantiated by the U.S. Department of Education*, GAO-10-370R

(February 23, 2010) (finding that “18 schools were found to have violated the ban in the 5 years before final safe harbor regulations were published on November 1, 2002, and 14 schools were found to have violated the ban in the 7 years afterward.”) This GAO Report further revealed that incentive compensation violations have occurred at all types of colleges, including public, non-profit and for profit schools. Thus, the detrimental consequences of uncertainty will be felt equally in private and non-profit educational institutions.

We respectfully request that the Department provide the required detailed explanation for its decision to depart so dramatically from its long-standing regulatory interpretation of the incentive compensation prohibition, and, in particular, that it explain why a system without specific guidance will work now when it failed so miserably from 1992 through 2002.

2. At a Minimum, the Department Should Keep the Current Guidance in Four Areas

The Department’s positions in the current NPRM – namely that the current rules (1) violate the incentive compensation prohibition and (2) address compensation arrangements that are unlawful – is entirely inconsistent with Congress’s intent and directly contradicts the Department’s prior view, quoted above, that such arrangements are, in fact, lawful.

When it enacted the incentive compensation prohibition in 1992, Congress intended to prohibit any kind of a “pay per head” system intended to generate enrollments in an institution without regard for the student’s likelihood for success or the nature of the educational program offered. In November 2002, when it published the current rules, the Department expressly and correctly recognized that Congress did not intend the incentive compensation prohibition to be boundless or to interfere with legitimate business practices:

Congress recognized that if given a strictly literal interpretation, section 487(a)(20) of the HEA could be interpreted to cover almost every compensation arrangement involving a student’s ultimate admission to a postsecondary institution. As a result, when enacting section 487(a)(20) of the HEA in 1992, the conference report resolving the different House and Senate versions of the Higher Education amendments of 1992 indicated that *the statutory words “directly” and “indirectly” in section 487(a)(20) of the HEA did not imply that institutions could not base salaries or salary increase on merit. Thus, Congress recognized that the scope of section 487(a)(20) of the HEA had limits....*

Federal Register, volume 67, pages 67,048 and 67,053 (emphasis supplied).

As the above language clearly indicates, the Department’s 2002 decision to adopt the current rules was wholly consistent with Congress’s intent. The Department’s current NPRM commentary, however, calls into question the legality of myriad compensation arrangements with wide groups of employees and third-party contractors – agreements that were entered into in reliance on the Department’s prior direct guidance. This drastic departure from the previous specific and detailed guidance would undoubtedly lead to widely varying interpretations, opinions, and challenges, just as happened in the years before 2002. For

that reason, and as detailed below, Kaplan asks that the Department maintain its current guidance in four areas.

- a. ***The Department should not eliminate the rule allowing the setting of merit-based salaries and routine salary adjustments based on performance (§ 668.14(b)(22)(ii)(A))***

While the incentive compensation prohibition itself is unclear, one thing *is* clear – that Congress did not intend to abolish merit-based compensation for admissions employees who successfully admit qualified students and for financial aid employees who assist them in obtaining financial aid. Nor did Congress intend to make admissions advisors and financial aid officers the only employees in America who are not compensated based on the quality of their performance.

Indeed, in enacting the incentive compensation prohibition, Congress stated that while it intended to ban the use of commissioned sales representatives, it did not intend to prevent schools from employing admissions advisors or from adjusting those advisors' salaries in part based on their success in enrolling students. The Conference Report that accompanied the final bill stated as follows:

The Senate bill eliminates any institution from Title IV eligibility that uses commissioned salespeople in any phase of its operation. The House bill adds a similar prohibition to the program participation agreements section but applies the limitation to the enrollment, recruitment, admissions and financial aid process.

The conference substitute applies the limitation to the enrollment, recruitment, admissions and financial aid process, [and] places it in the program participation agreement section The conferees note that substantial program abuse has occurred in the student aid programs with respect to the use of commissioned sales representatives. Therefore this legislation will prohibit their use. *The conferees wish to clarify, however, that use of the term "indirectly" does not imply that schools cannot base employee salaries on merit.* It does imply that such compensation cannot *solely* be a function of the number of students recruited, admitted, enrolled or awarded financial aid.

House of Representatives Report No. 102-630, part G, page 499 (1992) (Conference Report), *reprinted in* 1992 U.S.C.C.A.N. 334 (emphasis supplied). See also *United States ex rel Bott v. Silicon Valley Colleges*, 262 Federal Appendix 810, 811 (9th Circuit 2008) (finding that "[t]he Act does not prohibit salary reviews generally, but rather bars payment of a 'commission, bonus or other incentive payment' *solely* on the basis of recruitment success." 20 United States Code Section 1094(a)(20)(emphasis supplied)), *cert. denied*, 129 S.Ct. 573 (2009). In the current NPRM, however, the Department abandons its prior construction by stating that under the proposed rules, institutions would be barred from *any* consideration of such factors. In the proposed rules, accordingly, the Department wholly reverses its own statutory interpretation without adequate explanation and contradicts clearly-expressed Congressional intent.

We respectfully request that the Department adjust the final rule and accompanying guidance to clarify, consistent with the intent of Congress and current rule § 668.14(b)(22)(ii)(A), that institutions may take enrollment-related factors into account in determining and adjusting covered employees' salaries and to provide institutions with concrete guidance about precisely how they may do so without violating the incentive compensation prohibition.

- b. The Department should not eliminate the rule allowing payments to managers who do not directly supervise admissions advisors or financial aid personnel who make decisions about the awarding of HEA program funds (§ 668.14(b)(22)(ii)(G))***

In the proposed rules, the Department also would improperly extend the incentive compensation statute beyond employees engaged in admissions and financial aid. The incentive compensation prohibition is limited to persons and entities "engaged in any student recruitment or admission activity, or in making decisions regarding the awarding of title IV HEA program funds." Payments to persons who do not recruit or make financial aid decisions plainly fall outside the scope of this prohibition. See Mark Kantrowitz study, cited above, at page 6, note 7 ("if Congress intended for the prohibition to apply to people with an indirect involvement in these activities – effectively all faculty and staff at the college – it would have included the word 'directly or indirectly' immediately *before* the word 'engaged'")(emphasis supplied).

The Department appears to recognize this limitation, observing in the current NPRM that the prohibition covers "individuals who are engaged in any student recruitment or admissions activity or in making decisions about the award of financial aid," but it also inconsistently states that the prohibition "applies all the way to the top." Federal Register, volume 75, page 34,819. The words "directly or indirectly" in the statute modify the words "payment based ... upon success in." They do *not* modify the words "person or entity who is engaged in." Therefore, that language is relevant only to whether or not a particular payment is based (directly or indirectly) on success in securing enrollment. Indeed, the Department has long interpreted this provision of the Act not to reach "managerial or supervisory employees who do not directly manage or supervise employees who are directly involved in recruiting or admissions activities or the awarding of Title IV, HEA program funds." See 34 C.F.R. § 668.14(b)(ii)(22)(G).

This glaring inconsistency in the Department's NPRM statements underscores the need for the Department to clarify the precise scope of the "covered persons" limitation in the prohibition. Otherwise, compensation that colleges routinely pay to faculty and staff might be considered to be "indirectly" based on success in recruiting or admitting students. For example, unless a student enrolls, he or she cannot attend class; thus, payments to faculty depending upon the number of classes they teach, or the number of students in those classes, would be indirectly based on enrollment. As a further example, college athletic coaches often receive bonuses for national championships which, in turn, substantially increase college application rates. See Mark Kantrowitz study, cited above, at page 7 note 11. College coaches also regularly receive graduation and retention bonuses. For example,

a recent article noted that the University of North Carolina provides basketball coach Roy Williams with a substantial bonus if his team's graduation rate meets a certain benchmark. See *"UNC gives Roy Williams a four-year extension," USA Today*, (May 18, 2007); see also Mark Kantrowitz study, cited above, at page 7.

We respectfully request the Department to acknowledge in its regulations that the "directly or indirectly" language in the proposed rules does not apply to the determination of which persons or entities are covered by the prohibition. We urge the Department to maintain current rule § 668.14(b)(22)(ii)(G) to provide clear and consistent guidance on this point.

- c. ***The Department should not eliminate the rule allowing compensation based upon student retention and graduation (§ 668.14(b)(22)(ii)(E))***

The proposed rules contain an overbroad interpretation of the phrase "directly or indirectly" in another respect. On the grounds that encouraging improved retention and completion is "indirectly" related to success in securing enrollments, they forbid institutions to compensate employees based on improvements in student retention, completion, or rates of graduation. Federal Register, volume 75, pages 34,817-18. This proposed interpretation – which is yet another abandonment of the Department's prior interpretation – is deeply misguided, as well as irrational. It is impossible to understand why the Department would abandon a rule that is designed *to benefit and protect students* and support their education.

The purpose of the incentive compensation prohibition is to prevent "an institution from providing incentives to its staff to enroll *unqualified students*." Federal Register, volume 67, page 67,053 (emphasis supplied). Rewarding employees who play an important role in helping qualified students through to completion and graduation is good education policy. "Borrowers who drop out are three times more likely to default than borrowers who graduate, so improving completion rates will reduce default rates." See Mark Kantrowitz study, cited above, at page 13 and note 23; see also 34 C.F.R. §668, Appendix D, *Default Reduction Measures* (withdrawn Nov. 1, 2000) (recommending that institutions provide a "nominal commission" for enrolling students who never attend school, and "progressively greater commissions for students who remain in school for substantial periods").

The Department should maintain its current guidance in § 668.14(b)(22)(ii)(E) providing that institutions may compensate employees who engage in conduct that improves student retention and completion rates. At the very least, the Department should explain why it has abandoned its prior statutory interpretation and now believes that the use of student retention and graduation rates in measuring employees' performance would somehow violate the purposes or intent of the incentive compensation prohibition.

- d. ***The Department should not eliminate the rules allowing certain revenue-sharing arrangements with third parties (§ 668.14(b)(22)(ii)(J),(K)&(L))***

Finally, under the NPRM, the Department also would discard its rules governing third-party agreements in § 668.14(b)(22)(ii)(J),(K)&(L). The Department now asserts that the

incentive compensation prohibition “proscribes payments to ‘any persons or entities’ based directly or indirectly on success in securing enrollments,” and that an institution’s payment of third-party contractors thus constitutes a payment to an “entity” based on success in securing enrollments. See Federal Register, volume 75, page 34,818.

In reliance on the Department’s prior interpretations of the law, institutions entered into agreements paying third parties to help identify and locate quality students who would best benefit from the institutions’ program offerings. Such overall payments are often based, at least in part, on the total enrollments that result from the quality of the potential students provided. The Department’s proposed reversal of its prior view is based on an overbroad reading of the incentive compensation prohibition. As noted above, the prohibition addresses only payments “to any persons or entities involved in student recruiting or admissions activities.” The statute does not cover payments to third parties who are not themselves recruiting or admitting students, but are simply supplying information about potential applicants for the institution to use in its own recruitment and admissions activities.

The Department should adhere to its current interpretation of the incentive compensation prohibition, as set forth in § 668.14(b)(22)(ii)(J)(K)&(L), making clear that institutions can make incentive payments to third parties that deliver non-recruiting and recruiting services “as long as the individuals performing the recruitment or admission activities are not compensated in a way that is prohibited by Section 487(a)(20) of the HEA ” Federal Register, volume 75, pages 34,816-17.

HIGH SCHOOL DIPLOMAS: **COMMENTS OF KAPLAN HIGHER EDUCATION**

Kaplan wholeheartedly endorses the Department's goal of ensuring that students who report having high school diplomas "in fact have valid high school diplomas." Federal Register, volume 75, page 34,823. Indeed, Kaplan already has had in place for some time a process for identifying invalid or unacceptable high school diplomas. Kaplan strongly supports the Department's decisions that it should: (1) maintain a list of legitimate high schools, (2) use the FAFSA to identify students whose high school diplomas might give rise to questions, and (3) provide guidance to institutions in developing and implementing procedures to address the validity of applicants' high school diplomas. ***The proposed rules, however, should be clarified or improved in four ways.***

First, under the proposed rules, institutions must satisfy a new administrative capability requirement, but have received no substantive guidance about how to do so. See Federal Register, volume 75, page 34,875 (Proposed Rule § 668.16(p)). ***It is critically important that the Department articulate precisely the criteria that educational institutions should apply in determining whether they have "reason to believe that the high school diploma [of a particular applicant] is not valid."*** Federal Register, volume 75, page 34,823. There are no commonly-accepted industry practices for making such determinations, and the practices of educational institutions vary widely, as do potentially applicable state laws. Indeed, in light of the absence of standard practices, the Government Accountability Office has recommended that the Secretary of Education "provide institutions of higher education with information and guidance on determining the validity of high school diplomas for use in gaining access to Federal student aid." Federal Register, volume 75, page 34,823.

Unfortunately, if either the institution or the Secretary has some reason to believe that a diploma is not valid, the proposed rules place the burden on educational institutions – not the Department – to determine the validity of a diploma. It is vital not only that institutions receive concrete guidance from the Department, but also that they obtain it sufficiently in advance of the effective date of any new regulations to design and implement appropriate compliance procedures *and* also to train relevant employees to administer those procedures. ***We respectfully request that the preamble or the final rules make clear that the Department will provide the necessary, specific guidance that schools require with significant lead time (or, if it does not, that the Department will delay the effective date of the proposed rules).***

Second, as Kaplan and many other institutions noted during the Negotiated Rulemaking, and as the Department recognized (see Federal Register, volume 75, page 34,823), requiring each institution to maintain lists of acceptable and unacceptable high schools or to investigate the validity of the high school diploma in connection with each application would impose an excessive and undue burden on institutions. Thus, the Department proposes to maintain a "list of secondary schools," and believes that, as a result, the proposed rules will "impos[e] a minimal burden on institutions." *Id.* The necessary implication of the Department's statement that its list will lessen institutions' burdens is that

the list will both be available to the public and indicate whether the secondary school is acceptable. In addition, the proposed rules require institutions to investigate an applicant's diploma when *the Secretary* believes that a closer examination is warranted. *Id.* The Secretary could not convey this information to institutions unless it makes its list of acceptable secondary schools public. ***Thus, while Kaplan believes that the Department must intend to make its list of acceptable secondary schools public, we request that the Department expressly so state.***

Third, in light of the Department's express intentions, an institution should not be deemed to have "reason to believe" that a high school diploma is invalid unless the information on the students' FAFSA or the presence of the student's secondary school on the Department's list of unacceptable schools application gives rise to that belief. ***While Kaplan will continue to maintain its own internal procedures for determining whether high school diplomas meet Kaplan's standards for student admission, institutions should not otherwise have a general and independent obligation under the rules to investigate whether a high school diploma is invalid.***

Finally, we ask that the Department clarify that the new rules do not affect the eligibility status of students who enrolled and received Title IV funds prior to the effective date of the regulations. The Department should not penalize students, sanction institutions, or question the institution's administrative capability in audits or program reviews based on the past enrollment of students with high school diplomas which are, for the first time, deemed invalid under the new rules. In short, ***the Department should make clear that the proposed rules do not apply retroactively.***

RETURN TO TITLE IV FUNDS, TERM-BASED PROGRAMS WITH MODULES:
COMMENTS OF KAPLAN HIGHER EDUCATION

Kaplan agrees with the Department's efforts to clarify when a student is considered to have withdrawn from a period of enrollment for the purposes of calculating a return to Title IV, HEA program funds. However, Kaplan is concerned with one aspect of this proposal that fails to take into account students who have completed their coursework and earn a full grade for a course even though they may have technically withdrawn prior to the last day of the payment period or period of enrollment.

The Department proposes to revise § 668.22(a)(2) as follows:

- (2) A student is considered to have withdrawn from a payment period or period of enrollment if, prior to withdrawing
 - (i) In the case of a program that is measured in credit hours, *the student does not complete all the days in the payment period or period of enrollment that the student was scheduled to complete*; and
 - (ii) In the case of a program that is measured in clock hours, the student does not complete all of the clock hours in the payment period or period of enrollment that the student was scheduled to complete.

Federal Register, volume 75, page 34,875 (emphasis supplied).

In many cases students take final exams throughout the final week of a term and may cease attendance prior to the end of the payment period. A student may, for example, take the final exam on time, and receive a grade and full credit for the course. However, if the student technically withdraws after the final exam, but prior to the last date of the payment period, the institution may still be required to refund Title IV for that student for that payment period. This would be the case even if the payment period extended beyond the date of the final exam.

Kaplan respectfully asks the Department to clarify that the proposed revision to § 668.22(a)(i) and (ii) excludes from the Return to Title IV calculation students who have attended at least 60% of the term and have received an earned grade for at least one course within a term.

MISREPRESENTATION: **COMMENTS OF KAPLAN HIGHER EDUCATION**

The HEA forbids any “substantial misrepresentation” made by an institution regarding “the nature of its educational program, its financial charges or the employability of its graduates.” 20 U.S.C. § 1094(3)(B). A “substantial” misrepresentation is one “on which the person to whom it was made could reasonably be expected to rely, or has reasonably relied, to that person’s detriment.” 34 C.F.R. § 668.71(b). If a misrepresentation is deemed substantial, the Department may initiate sanctions proceedings against the institution. See 34 C.F.R. Subpart G.

Kaplan applauds the Department’s decision to continue to regulate “substantial misrepresentations.” In addition, we agree with the Department’s decision to place an increased emphasis on defining and preventing misrepresentation. There are, however, at least six ways in which the proposed rules would unfairly expand the reach of the current misrepresentation rules. ***As a result, we urge the Department to reconsider these proposed rules.*** The six problems with the proposed rules are described in detail below.

First, the proposed rules would authorize punishment of an eligible institution not only for its own alleged misrepresentations, but also for those of any non-eligible institution, organization or person with whom the eligible institution has an agreement. The Department contends that “it is appropriate to hold the eligible institution accountable [when it has an agreement with a non-eligible institution or entity] because the integrity of title IV, HEA programs requires that institutions are responsible for the actions of their representatives and agents.” Federal Register, volume 75, page 34,834. This interpretation goes beyond the statutory language and potentially makes an eligible institution strictly liable for the conduct of another entity or person that it does not control. For example, some institutions agree to provide information to companies that compile college rankings. Parents and students regularly rely on these quality rankings, such as those published annually in *U.S. News and World Report*, yet such rankings are often derided as inaccurate, incomplete, or just outright false. In 2007 Michele Toleda Meyers, the president of Sarah Lawrence College, wrote an opinion editorial in *The Washington Post* alleging that the *U.S. News and World Report* rankings use made-up data. See Michele Toleda Meyers, *The Cost of Bucking College Rankings*, *The Washington Post* (March 11, 2007). *U.S. News and World Report* later admitted that its data was not entirely correct. See Scott Jaschik, *Would U.S. News Make Up Data*, Inside Higher Ed. (March 12, 2007). Under the Department’s interpretation of its proposed misrepresentation rules, every school that participated in an inaccurate survey is now liable for the survey’s misstatements.

Even worse, the proposed rules do not limit the eligible institution’s liability for its agents’ misrepresentations to statements related to the agency relationship. As a result, eligible institutions are left potentially liable for any misrepresentation on any topic by such an agent. This broad reach of responsibility would discourage eligible institutions from contracting with third parties even where doing so would benefit, protect, or save costs for students. Broadening the concept of misrepresentation in this way is also fundamentally unfair, because it makes an eligible institution responsible and potentially subject to serious

punishment when it had no intent to deceive and no involvement in any deception. ***We urge the Department not to adopt this interpretation of the Act.***

Second, the proposed rules would prohibit not only direct, but also “indirect,” misrepresentations. The Department proposes to “broaden the concept of misrepresentation” in this way because “students, prospective students, members of the public and others can be significantly harmed by indirect false, erroneous or misleading statements.” Federal Register, volume 75, page 34,834-35. This proposed rule unfairly makes an eligible institution responsible in all instances in which an alleged misrepresentation is repeated by a third party, even if the institution (1) did not control the third party, (2) had no intention that the statement be repeated, (3) believed the statement was made in a setting where it would not be repeated, and (4) later discovered and attempted to cure the alleged misrepresentation. ***We urge the Department not to adopt this interpretation.***

Third, the proposed rules would extend misrepresentation from statements or omissions that actually deceive to those with the “capacity, likelihood or tendency to deceive or confuse.” Federal Register, volume 75, page 34,834. Kaplan has no objection to defining misrepresentation to include statements or omissions with a “likelihood” of deceiving or confusing the reasonable recipient. Statements that have the “capacity” or a “tendency” to deceive, however, may not be “likely” to deceive, although many courts appear to use these formulations interchangeably. See *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976). This extremely broad rule will potentially cover statements made every day by universities across the country – such as:

- “University of Maryland ... offers opportunity for personal growth ... including study abroad opportunities ... [and] service learning ... that *only* a university located next to the nation’s capital can provide.” Dan Mote, President University of Maryland, video statement on “President’s Promise” (see <http://www.presidentspromise.umd.edu/home.cfm>; or
- “. . . MSU has a place for everyone. . .” Michigan State University, Admissions Office, website <http://admissions.msu.edu/campusLife/default.asp>.

While not “likely” to deceive anyone, certainly an argument can be made that each of the above statements could have the “tendency” to deceive a student that, for example, certain learning opportunities are “only” available at the particular school (University of Maryland statement), or that entrance and a place to live are guaranteed (Michigan State University statement). ***Kaplan requests that the Department clarify that, in addition to their “capacity” or “tendency,” statements or omissions must be “likely” to deceive the reasonable recipient in order to constitute a potential misrepresentation under the proposed rules.***

Fourth, the proposed rules should be amended to make clear that an institution may not be punished for a misrepresentation unless it had intent to mislead or deceive. *Black’s Law Dictionary* (7th ed. 1999), at page 1016, defines misrepresentation as “the act of making a false or misleading statement about something, usu[ally] with the intent to deceive.” Educational institutions should, of course, be prohibited from continuing to make statements or allow omissions that are misleading; but they should not be sanctioned unless they act

with intent to deceive. The proposed rule would cover statements of status or awards that later turn out to be incorrect such as incorrect college rankings as noted above. ***The Department should amend its proposed regulation to make clear that an institution will be sanctioned for misrepresentations only if it has intent to deceive.***

Fifth, the proposed rules specify a number of topics related to the nature of the educational program, the nature of financial charges, and the employability of graduates in which misrepresentations are of particular concern. We welcome this clear and detailed guidance about the Department's focus. One aspect of this guidance, however, should be clarified or modified.

The proposed rules specifically bar misrepresentations regarding "the institution's knowledge about the current or likely future conditions, compensation, or employment opportunities in the industry or occupation for which the students are being prepared." Federal Register, volume 75, page 34,882 (Proposed Rule § 668.74). As was pointed out during the Negotiated Rulemaking process, no school can know the future, and predictions are based on numerous factors. In hindsight, it may be easy for a student or regulator to characterize a prediction as a misrepresentation. This problem is exacerbated by the current volatile economic climate and by the length of some programs. If an employment picture changes quickly and a course of study extends a full year or multiple years, a reasonable prediction that employment prospects in a particular field are bright may change before a program is completed. See, e.g., id. at 34,849 (participants in the Negotiated Rulemaking were "concerned about the ability to provide accurate information given the economic environment and timeframes involved"). In addition, many general statements may be characterized as misrepresenting "the institution's knowledge about . . . future conditions" – for example: "your future is bright," "you can make a better life for yourself," "obtaining a degree will be worthwhile."

The proposed rules would unduly chill eligible institutions' right to engage in commercial speech to market the educational opportunities they offer and inform prospective students about their programs. ***The Department should modify this aspect of the proposed rule to make clear that predictions about future employment or compensation will not be deemed misrepresentations unless they purport to be based on statements of fact which at the time they are made are objectively false or themselves misleading. At the very least, the Department should clearly state that general statements of opinion about the benefits of enrolling in or completing a program will not be treated as misrepresentations about the future.***

Finally, the proposed rules also authorize the Department to sanction institutions for misrepresentations without first providing notice and an opportunity to be heard. See Federal Register, volume 75, page 34,881. Specifically, the Department may revoke the institution's program participation agreement, limit the institution's participation in Title IV, HEA programs, deny participation applications made on behalf of the institution, *or* invoke proceedings under 34 C.F.R. Subpart G. This change is deeply problematic for two reasons. The first reason is that the HEA currently requires that, except in emergency situations, an institution must receive notice and an opportunity to be heard before the Department

concludes that a misrepresentation has been made and imposes a sanction. 20 U.S.C. Section 1094; 34 C.F.R. §§ 668.84, 668.85 and 668.86. The proposed rules, however, would allow sanctions to be imposed without these fundamental due process protections. See Federal Register, volume 75, page 34,849. ***The Department should modify the proposed rules to make clear that institutions will not be subject to adverse action without first receiving the due process provided under Subpart G or through some other proceeding.***

The second reason the change is problematic is that in proceedings conducted under Subpart G, the administrative law judge considers the relative materiality of the misrepresentation in deciding whether to impose a particular sanction. Those rules provide that “[i]n determining the amount of a fine, the designated department official, hearing official, and the Secretary take into account . . . [t]he gravity of the institution’s . . . misrepresentation.” 34 C.F.R. § 668.92(a)(1)(ii). ***If the Department authorizes the imposition of sanctions under some process other than that set forth in Subpart G, it should also modify the proposed rules to clarify that the degree of materiality of the misrepresentation must be taken into account in determining whether a sanction should be imposed and, if so, what the sanction should be.*** That is, a misstatement that an 87% completion rate is 90% either should not be sanctioned or should result only in the mildest of punishments.